



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MAYMULAKHIN AND MARKIV v. UKRAINE

(Application no. 75135/14)

JUDGMENT

Art 14 (+ Art 8) • Discrimination • Private and family life • Absence of any form of legal recognition and protection for a same-sex couple • Unjustified difference in treatment of a same-sex couple *vis-à-vis* different-sex couples on the basis of sexual orientation

STRASBOURG

1 June 2023

FINAL

01/09/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Maymulakhin and Markiv v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani, *President*,

Carlo Ranzoni,

Mārtiņš Mits,

María Elósegui,

Mattias Guyomar,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 75135/14) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Andriy Yuriyovych Maymulakhin and Mr Andriy Mykhaylovych Markiv (“the applicants”), on 24 November 2014;

the decision to give notice of the application to the Ukrainian Government (“the Government”);

the observations submitted by the Government and the observations in reply submitted by the applicants;

written comments from Fédération Internationale pour les Droits Humains, Centre for Civil Liberties, Network of European LGBTIQ Families Association and European Commission on Sexual Orientation Law, Ordo Iuris Institute for Legal Culture and the NGO “All together!”, which were granted leave by the Section President to intervene as third parties in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court);

Having deliberated in private on 9 May 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicants are two men who have been living as a couple since 2010. They complained under Article 14, taken in conjunction with Article 8 of the Convention, that the absence of any possibility under Ukrainian law for them to enter into marriage or any other type of civil union recognising their relationship amounted to discrimination on the basis of sexual orientation.

THE FACTS

2. The applicants were born in 1969 and 1984 respectively and live in Kyiv. They were represented by Mr M. Tarakhkalo, Ms V. Lebid and Ms Y. Zayikina, lawyers practising in Kyiv.

3. The Government were represented by their Agent, most recently Ms M. Sokorenko.

4. The facts of the case may be summarised as follows.

5. The applicants have been living together in a stable and committed relationship since 2010.

6. In October 2014 they gave notice of marriage (*подали заяву про державну реєстрацію шлюбу*) to seven different departments of the Register Office (*відділи державної реєстрації актів цивільного стану*) in Kyiv and the Kyiv region. The authorities rejected all those notices on the grounds that the Constitution and the Family Code of Ukraine explicitly defined marriage as a family union between a woman and a man (see paragraphs 9-10 below). Since that was not the applicants' case, their notice of marriage could not be processed.

7. On 28 September 2021 the applicants drew up their wills bequeathing all their property to each other.

8. Shortly after the outbreak of the war in Ukraine on 24 February 2022, the second applicant joined the National Guard of Ukraine. Having replied in the negative to his superiors' question whether he had a wife, he was informed that in the event of his death it was his mother who would be notified. In June 2022 the second applicant suffered a myocardial infarction and underwent heart surgery, after which he had one month's leave. The applicants spent that time together. On 23 February 2023 the second applicant resigned from the National Guard for health reasons.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Constitution of Ukraine

9. The relevant provisions of the Constitution read as follows:

Article 21

“All people shall be free and equal in their dignity and rights. Human rights and freedoms shall be inalienable and inviolable.”

Article 51

“Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family. ...”

Article 63

“A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law. ...”

B. Family Code of Ukraine

10. The relevant provisions of the Family Code read as follows:

Article 3. Family

- “1. The family is the primary and basic unit of society.
2. The family is composed of persons living together, sharing a joint household and having mutual rights and obligations. ...
- ...
4. The family is founded on the basis of a marriage, blood ties, adoption or any grounds which are not contrary to the law and morals of society.”

Article 9. Regulation of family relations by an agreement (contract) between the parties concerned

- “1. A married couple, the parents of a child, parents and their children, as well as other family members and relatives whose relations are regulated by this Code, may regulate the relations between them by an agreement (contract) if this does not contradict the provisions of this Code, other laws or moral principles of society.
2. Persons living together as a family and blood relatives whose relations are not regulated by this Code may regulate their family (relatives’) relations by a written contract. Such a contract shall have binding effect if it does not contradict the provisions of this Code, other laws or moral principles of society.”

Article 21. The concept of marriage

- “1. Marriage is a family union between a woman and a man registered in the State civil status registry.
2. The situation of a woman and a man living together as a family without being married shall not give rise to the rights and obligations of a married couple. ...”

Article 26. Persons between whom marriage is not allowed

- “1. Marriage is not allowed between direct lineal relatives.
2. Marriage is not allowed between siblings and half-siblings. ...
3. Marriage is not allowed between cousins, an aunt and a nephew, or an uncle and a niece.
4. Marriage between a natural child and an adopted child or between adopted children of [the same person] may be allowed by a judicial decision.
5. Marriage is not allowed between an adoptive parent and [his or her] adopted child. Such a marriage may be registered only in the event of the termination of the adoption.”

Article 74. Property rights of a woman and a man living together as a family without being married to each other or to any other person

“1. If a woman and a man live together as a family without being married to each other or to any other person, the property acquired by them during their cohabitation shall be their joint property unless otherwise established by a written contract between them.

2. Chapter 8 [on joint property of a married couple] of this Code shall apply to [such joint property].”

Article 76. Right to maintenance after dissolution of marriage

“1. A right to maintenance which emerged during marriage shall not cease to exist on the dissolution of the marriage.

2. A person shall be entitled to maintenance after the dissolution of marriage if he or she became incapacitated prior to the dissolution of the marriage or within a year thereafter, if that person requires material assistance and if his or her former spouse is able to provide such material assistance.

A person shall also be entitled to maintenance if he or she became disabled later than within a year after the dissolution of marriage, if his or her disability resulted from unlawful behaviour of his or her former spouse towards him or her during the marriage.

3. If at the time of the dissolution of marriage the wife or the husband is to reach the legally established retirement age within five years, she or he shall be entitled to maintenance after having reached that retirement age, subject to the condition that they lived together in marriage for at least ten years.

4. If one of the spouses was prevented from receiving education, obtaining employment or holding a particular post by being in charge of child care, housekeeping, taking care of family members, or as a result of a disease or other circumstances of substantial significance, he or she shall be entitled to maintenance even while being able to work, subject to the condition that he or she requires material assistance and that his or her former spouse is able to provide it.

In that case, the maintenance entitlement shall last for three years after the dissolution of marriage.”

Article 91. Right to maintenance for a woman and a man living together as a family without being married

“1. If a woman and a man have been living together as a family without being married for a long time and if one of them became incapacitated during that cohabitation, he or she shall be entitled to maintenance in accordance with Article 76 of this Code.

2. A woman or a man shall be entitled to maintenance ... without being married if their common child lives with one of them.”

Article 211. Persons who may be adoptive parents

“...

3. A married couple ... may be adoptive parents.

Persons of the same sex may not be adoptive parents.

4. Persons who are not married may not adopt the same child. Where such persons live as a family, a court may deliver a decision on adoption of a child by them.”

C. Civil Code of Ukraine

11. Article 287 of the Civil Code regulates the rights of persons who have been hospitalised for inpatient medical treatment. Its relevant provision reads as follows:

“1. Persons undergoing inpatient medical treatment in a hospital shall be entitled to visits from ... their family members ...”

12. The Civil Code defines the following lines of succession for legal heirs: the first line – the deceased’s children, spouse and parents (Article 1261); the second line – the deceased’s siblings and grandparents (Article 1262); the third line – the deceased’s uncles and aunts (Article 1263); the fourth line – “persons who had been living with the deceased as a family for at least five years before the opening of the inheritance” (Article 1264); and the fifth line – the deceased’s other relatives up to the sixth degree of kinship, as well as dependants who are not his or her family members (Article 1265).

D. Code of Civil Procedure of Ukraine

13. Article 71 of the Code of Civil Procedure reads as follows:

“1. An individual may not refuse to testify, except where his or her testimony would incriminate himself or herself or his or her family member or close relative (husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather, grandmother, grandson, granddaughter, adoptive parent or adopted child, guardian or caregiver, person under guardianship or in care, or a family member or close relative of such a person). ...”

E. Code of Criminal Procedure of Ukraine

14. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 3. Definitions of the main terms of the Code

“1. Terms used in this Code shall have the following definitions if not indicated otherwise:

(1) close relatives and family members – husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather, grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, adoptive parent or adopted child, guardian or caregiver, person under guardianship or in care, as well as persons living together, sharing a joint household and having mutual rights and obligations, including those cohabiting without being married. ...”

Article 18.

Freedom from self-incrimination and from testifying against close relatives or family members

“... ”

3. Nobody shall be forced to give explanations or testimony capable of providing a basis for suspecting or accusing his or her close relatives or family members of a criminal offence.”

F. Labour Code of Ukraine

15. Article 38 of the Labour Code provides for more flexible conditions for the termination of an employment contract for persons whose family member is ill and in need of care.

16. Article 120 provides that employees who are obliged to change their place of residence as a result of their transfer to a different job are eligible for relocation allowances which also cover their family members.

II. MEASURES AND EVENTS RELATING TO POTENTIAL LEGISLATIVE CHANGES IN UKRAINE

A. The National Human Rights Strategy

1. Adopted in August 2015

17. The National Human Rights Strategy (“the Strategy”) approved by Presidential Decree no. 501/2015 of 25 August 2015 defined preventing and combating discrimination as one of its strategic areas. One of the Strategy’s principles was equality and non-discrimination in ensuring respect for human rights and freedoms. Putting in place an effective system for preventing and combatting discrimination was among the strategic goals to be achieved. The Strategy was to take into account, *inter alia*, the experience of the United Nations, the Council of Europe, the Organization for Security and Cooperation in Europe and other international organisations, as well as the Court’s case-law.

18. The Action Plan for implementation of the Strategy for the period until 2020, which was approved by the Cabinet of Ministers on 23 November 2015, provided for, in point 105 § 6, the drafting of a law on legalisation of registered civil partnerships for different-sex and same-sex couples and its submission to the government by the end of the third quarter of 2017. That draft law was to regulate, in particular, the partners’ property and non-property rights, including property possession and inheritance, entitlement to maintenance in the event of incapacity and the constitutional right not to testify against one’s partner.

19. The 2019 Report by the Ministry of Justice on the implementation of the above-mentioned Action Plan stated that it was impossible to execute point 105 § 6 of the plan for the following reasons:

“The Ministry of Justice of Ukraine has received a significant number of petitions from regional, city and district councils, non-governmental and religious organisations, namely the Zaporizhzhya Regional Council, the Kamyanets-Podilskyi City Council, the Ternopil Regional Council, the Rivne City Council, the Rivne Regional Council, the Rivne District Council in the Rivne Region, the Ostroh City Council, the Poltava City Council, the Fastiv City Council in the Kyiv Region, the Novovolynsk City Council in the Volynska Region, the Mykolaiv Regional Council, the Nova Odesa District Council in the Mykolaiv Region, the Dunaivtsi City Council in the Khmelnytskyi Region, the Ukrainian Council of Churches and Religious Organisations, as well as the non-governmental organisations ‘Love against homosexuality’, ‘Mercy and justice mission’, ‘Public movement “All together!”’, ‘Drevo’ and ‘Union of Christian military servicemen of Ukraine’ arguing that point 105 § 6 of the Action Plan was inadmissible and that its implementation should be stopped.

Having examined all the above-mentioned petitions and bearing in mind their significant number, and having analysed the Constitution of Ukraine, the existing international treaties to which Ukraine is a party, and other legal provisions, we consider that the implementation of point 105 § 6 is impossible.”

20. A similar report by the Ministry of Justice for 2020 contained a brief note that point 105 § 6 of the Action Plan had not been implemented and that it was necessary to define who was in charge of its implementation.

2. Adopted in March 2021

21. By Decree No. 119/2021, which entered into force on 26 March 2021, the President of Ukraine repealed the earlier Decree no. 501/2015 (see paragraph 17 above) and adopted a new version of the National Human Rights Strategy. While its general provisions and principles remained the same, the new Strategy specified, among the expected outcomes, that Ukrainian legislation in the area of preventing and combating discrimination should meet international, including European, standards and take into account global best practices, as well as the practical challenges faced by Ukraine in the area of human rights and freedoms.

22. The Action Plan for implementation of the Strategy for the period from 2021 to 2023, which was approved by the Cabinet of Ministers on 23 June 2021, contained the following point, with the deadline for its implementation being set at December 2023:

“33. Drafting and submission to the Cabinet of Ministers of Ukraine of a draft law aimed at eliminating discriminatory provisions capable of violating property and non-property rights of unmarried partners, and introduction of the institution of a registered civil partnership.”

B. Ukraine’s application for membership of the European Union

23. On 28 February 2022, five days after Russia launched its full-scale military aggression against Ukraine, Ukraine presented its application for membership of the European Union.

24. In April 2022 the Government of Ukraine completed the questionnaire requested by the European Commission. One of the questions therein read as follows:

“198. Elaborate how the right to marry and the right to found a family are protected within the domestic legislation, including partnerships open to same-sex couples.”

The Government’s answer contained the following paragraph:

“Presently, Ukrainian legislation does not provide the opportunity of marriage for same-sex couples. For the time being, the Government of Ukraine is taking measures to improve and study the issue of same-sex partnerships legalisation.”

The above paragraph was followed by a reference to point 33 of the Action Plan for implementation of the National Human Rights Strategy (quoted in paragraph 22 above).

C. Public petition for legalisation of same-sex marriages in Ukraine and related events

25. After the beginning of the war the issue of the absence of any legal recognition and protection for same-sex couples became a subject of public discussion in the new context, that of wartime. Persons in same-sex relationships who joined the Ukrainian defence forces on the battlefield found themselves in a situation where their partners would not be notified in the event of their wounding, captivity or death, let alone allowed to see them in hospital or to claim the body.

26. In May 2022 the Kyiv International Institute of Sociology conducted an opinion poll on the attitude of Ukrainians towards lesbian, gay, bisexual and transgender (LGBT) people and its evolution. Its results showed that, compared with a previous similar poll in 2016, the number of LGBT-friendly responses was two to five times higher. In particular, the share of respondents who indicated that they supported full equality of LGBT people increased from 33.4% to 63.7%, support for the introduction of registered civil partnerships for same-sex couples increased from 4.8% to 23.6%, and the proportion of respondents who were indifferent to the issue increased from 18% to 27.1%.

27. On 3 June 2022 an online public petition entitled “Legalisation of same-sex marriages” was placed on the website of the President of Ukraine. Its text read as follows:

“At this time any day may be the last one. May same-sex [couples] have the opportunity to found a family and have an official document confirming this. They need the same rights as traditional couples.”

28. Given that the above petition was signed by more than 25,000 persons within three months, the President of Ukraine was under an obligation to examine it. On 2 August 2022 he published the following response:

“... I thank everyone involved in [advancing] this petition for their active civil position.

In the modern world, State policy aimed at ensuring equal rights for all citizens is one of the benchmarks of democracy in society. Each citizen is an integral part of civil society enjoying all rights and freedoms enshrined in the Constitution of Ukraine.

All people are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable (Article 21 of the Constitution of Ukraine). The Family Code of Ukraine defines the family as the primary and basic unit of society. The family consists of persons living together, sharing a joint household and having mutual rights and obligations. Under the Constitution of Ukraine, marriage is based on free consent between a woman and a man (Article 51).

The Constitution of Ukraine cannot be amended under the conditions of martial law or a state of emergency (Article 157).

That said, the government has developed some possible solutions in respect of legalisation of registered civil partnerships in Ukraine, in the framework of its [human rights work].

... the Cabinet of Ministers of Ukraine is taking measures to ensure human rights and freedoms.

In the light of the foregoing, I have asked the Prime Minister of Ukraine to examine the issue raised in the online petition and to inform me of the outcome.”

29. On 5 August 2022 the Prime Minister of Ukraine, in turn, directed the Ministry of Justice to prepare a draft law on registered civil partnerships.

30. In November 2022 numerous Ukrainian and international media published a story about the marriage of a Ukrainian woman and her childhood homosexual male friend, who was about to be sent to the battlefield. Marriage was seen by them as the only way for the man to have somebody to interact with the authorities if anything happened to him, given that he had no close relatives and his same-sex partner could not claim any rights.

31. In early January 2023 the National Democratic Institute conducted a nationwide telephone survey entitled “Opportunities and Challenges Facing Ukraine’s Democratic Transition”. One of the questions was whether LGBT+ people should have the right to enter into a civil partnership. It received a positive reply in 56% of cases.

III. INTERNATIONAL LAW AND PRACTICE

A. United Nations

32. The relevant extract from the report “Discrimination and violence against individuals based on their sexual orientation and gender identity” published by the Office of the United Nations High Commissioner for Human Rights on 29 May 2015 is quoted in *Fedotova and Others v. Russia* ([GC], nos. 40792/10 and 2 others, § 46, 17 January 2023).

33. In the report on his visit to Ukraine from 30 April to 10 May 2019, the United Nations’ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity made the following findings (footnotes omitted):

A. Legal framework

“8. ... Sexual orientation and gender identity are not included as explicitly protected grounds of discrimination in the Constitution (art. 24) or the law ‘on principles of preventing and combating discrimination’. However, both instruments use open-ended lists of grounds, thus allowing for protection through judicial interpretation.

...

10. While the Independent Expert was informed of a gradual improvement in perceptions about the lives of lesbian, gay, bisexual, trans and gender diverse persons, in more recent times a regressive trend has been identified: for example, in parliament it has become impossible to discuss gender-related issues, with parliamentary factions openly combating ... the protection of sexual minorities, and systematically trying to deconstruct existing legal infrastructure protecting lesbian, gay, bisexual, trans and gender diverse persons from discrimination, or to introduce discriminatory legislation.

...

11. The Independent Expert was informed that churches actively promote discriminatory bills and block policies and legislation aimed at protecting persons from discrimination based on sexual orientation and gender identity. The All-Ukrainian Council of Churches and Religious Organizations, for instance, successfully opposed attempts to include sexual orientation and gender identity as protected characteristics in the anti-discrimination legislation ...

12. Of particular importance, the Independent Expert was informed of a concerted campaign aimed at influencing all branches of Government to discriminate against lesbian, gay, bisexual, trans and gender diverse persons. Since 2018, national and local authorities, the parliament and the Ombudsperson have been the target of thousands of petitions received through their websites and supported – and sometimes initiated – by religious authorities, all demanding a ban on ‘homosexual propaganda’ under the banner of ‘protecting the traditional family’. In one such petition, ‘on the protection of traditional family values and concept of family’, the Government was called on to take action to protect traditional family values, prohibit propaganda and the promotion of ‘deviant sexual behaviours’ and ‘anti-family ideas’ ...

13. ... The Independent Expert is particularly concerned about the reaction of some local councils which ... adopted homophobic appeals to the Government themselves. In 2018, the Ombudsperson sent letters to several city councils requesting that they annul

a decision that violated legal requirements guaranteeing the right to respect for dignity and freedom from discrimination. ...”

B. Institutional and police framework

“ ...

18. ... the Independent Expert notes that only an estimated 25 to 30 per cent of the lesbian, gay, bisexual, trans and gender diverse component of the human rights action plan had been implemented by 2019 and, with great concern, observes that the following items have not yet been implemented fully or in a significant matter:

(a) Introduction of sexual orientation and gender identity as prohibited grounds of discrimination in the law on principles of preventing and combating discrimination;

...

(d) Legalization of registered civil partnerships for both opposite-sex and same-sex couples; ...”

IV. Discrimination

“62. The Independent Expert was informed that discrimination against lesbian, gay, bisexual, trans and gender diverse persons takes place in almost every area of life, and in particular in the areas of employment, education, health care and access to justice. However, complaints are rarely lodged with State authorities and victims seldom resort to legal proceedings. ...”

D. Family life

“ ...

83. The Constitution (art. 51) and the Family Code (art. 21) define marriage as a union between a woman and a man. The institution of marriage is therefore not open to same-sex couples in Ukraine, and registered partnerships are not recognized either. As a member of the Council of Europe, Ukraine is, however, obliged to comply with standards set by the Convention for the Protection of Human Rights and Fundamental Freedoms and must therefore provide legal recognition (such as civil unions or registered partnerships) for same-sex couples. In order to fulfil this requirement, the State had planned to legalize registered civil partnerships for both opposite-sex and same-sex couples through the human rights action plan. This item has, however, been exploited for sociopolitical ends and ended up polarizing and dividing the society. Following numerous complaints from local authorities, civil society members and religious organizations, the Ministry of Justice concluded that the implementation of this action was currently impossible.

84. According to a 2009 research study, two thirds of the lesbian, gay, bisexual, trans and gender diverse persons interviewed had same-sex partners; about half of these couples were living together and had a joint household, and about one tenth were bringing their children up together with a partner. Lesbian couples were raising children together twice as often as gay couples, and the Independent Expert heard numerous testimonies of lesbian women who expressed great concern at the vulnerability of their family. Many of them had entered into a heterosexual marriage before, due to social and family pressure, and were now raising their children with their same-sex partner. As a result of the lack of legal protections, same-sex couples face numerous problems, such as the impossibility of acquiring or registering joint ownership of property,

resolving property disputes, making vital decisions on behalf of their partner, disposing of joint property and inheriting after the death of a partner.

85. Individuals in same-sex couples are currently unable to adopt the child of their partner ...”

VII. Conclusions and recommendations

“86. The Independent Expert is encouraged by legal and historical developments concerning the protection of the human rights of lesbian, gay, bisexual, trans and gender diverse persons in Ukraine, and he believes that the State is at a juncture where it can take action to make significant progress in that connection.

87. Political leadership is crucial in this area. Sexual orientation and gender identity issues have never been irrelevant for society, and they have always been the object of heated debate. But the extent to which a society is ready to embrace diversity should never be determined by the fear of that debate, or the acceptance that the rights of some should be unduly limited.

88. The Independent Expert recommends that the Ukrainian authorities take a decided stand for equality on the basis of sexual orientation and gender identity, and the adoption of the measures connected to that equality. In that connection, he is of the view that the human rights action plan is an excellent blueprint and that the effective adoption of the measures described therein would be a significant step to bring Ukraine in full conformity with its international obligations in this field.

89. The Independent Expert recommends in particular that Ukraine take the actions detailed below.”

A. Legislative, institutional and policy framework

“90. With regard to its legislative, institutional and policy framework, Ukraine should:

(a) Ensure that items of the human rights action plan related to sexual orientation and gender identity that have not yet been implemented are reiterated in the new action plan and are speedily implemented, in line with its commitments under the National Human Rights Strategy;

(b) Ensure the strict separation of powers and withdraw the privileged status currently granted to some Ukrainian churches consulting with State institutions; ...”

G. Family life

“96. In the area of family life, Ukraine should:

(a) Implement the measures envisaged in the human rights action plan, including the introduction of the institution of registered civil partnership ...”

B. Council of Europe

34. The relevant documents of the Council of Europe’s institutions are quoted in *Fedotova and Others* (cited above, §§ 48 and 49, both *in principio*, as well as §§ 50-52, 54 and 56).

35. The relevant extracts from the fifth report of the European Commission against Racism and Intolerance (ECRI) on Ukraine, adopted on 20 June 2017 and published on 19 September 2017, read as follows:

“118. Concerning family law matters, Article 51 of the Constitution specifically defines marriage as a voluntary union between a man and a woman. No legal recognition exists for same-sex marriage or registered same-sex partnerships. However, the Action Plan on Implementation of the National Human Rights Strategy provides for the drafting of a bill creating registered civil partnerships for opposite and same-sex couples. ECRI was informed that an expert group has been set up to consider the issue with a view to adopting the legislation by mid-2017.”

C. Other international material

36. The relevant documents of the European Union and the Inter-American Court of Human Rights are quoted in *Fedotova and Others* (cited above, §§ 57-64).

IV. COMPARATIVE-LAW MATERIAL

37. The results of the Court’s comparative study of the forms of legal recognition of same-sex couples in the member States of the Council of Europe are quoted in *Fedotova and Others* (cited above, §§ 65-67).

THE LAW

I. THE APPLICANTS’ COMPLAINT AND ITS LEGAL CLASSIFICATION

38. Relying on Article 14 in conjunction with Article 8 of the Convention, as well as Article 1 of Protocol No. 12, the applicants complained that the impossibility under Ukrainian law for them to enter into marriage or any other type of civil union recognising their relationship amounted to discrimination on the basis of sexual orientation.

39. Whereas Article 14 of the Convention prohibits discrimination in the enjoyment of “the rights and freedoms set forth in [the] Convention”, Article 1 of Protocol No. 12 extends the scope of protection to “any right set forth by law”. It thus introduces a general prohibition of discrimination. Notwithstanding the difference in scope between the two provisions, the meaning of the term “discrimination” is identical in both (see paragraph 18 of the Explanatory Report to Protocol No. 12).

40. The applicants in the present case, a cohabiting same-sex couple living in a stable *de facto* partnership, raised an allegation of discriminatory treatment on account of the lack of legal recognition and protection for their relationship as a couple. The Court has already held that this matter falls within the notion of both “private life” and “family life” within the meaning

of Article 8 (see *Schalk and Kopf v. Austria*, no. 30141/04, § 95, ECHR 2010, and *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 151, 17 January 2023). Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies.

41. That being so, the Court considers that, although the applicants additionally relied on Article 1 of Protocol No. 12, their complaint falls to be examined only under Article 14 read in conjunction with Article 8 of the Convention (see, *mutatis mutandis*, *Alexandru Enache v. Romania*, no. 16986/12, §§ 49-50, 3 October 2017). These provisions read as follows:

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

42. Lastly, the Court notes that the applicants have formulated their complaint under Article 14 taken in conjunction with Article 8 rather than relying on Article 8 alone. The Court finds it appropriate to follow this approach (see *Schalk and Kopf v. Austria*, no. 30141/04, § 88, ECHR 2010, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 71, ECHR 2013 (extracts)).

II. ADMISSIBILITY

43. The Government did not raise any objections in respect of the admissibility of the application. They also accepted that Article 14 of the Convention in conjunction with Article 8 was applicable to the facts of the case.

44. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

III. MERITS

A. The parties' submissions

1. *The applicants*

45. The applicants maintained that they were suffering from discrimination as a same-sex couple. They noted that, unlike different-sex couples, who could have their rights protected either through marriage or, albeit to a lesser degree, by proving the existence of their *de facto* family union, same-sex couples were not legally recognised in Ukraine and had no legal protection at all.

46. The applicants observed that, being a same-sex couple, they were denied all the basic rights applicable to different-sex couples, such as the right to joint matrimonial property, the right to inheritance by law, the right to receive visits from the partner in the event of hospitalisation, the right to refuse to testify against one another, the right to adoption, the right to social assistance and benefits for low-income families, and so on.

47. The applicants further noted that, although some aspects of their life as a couple could be regulated by private contractual agreements, such agreements were of limited scope and were not able to cover many important rights regulated exclusively by law. No less importantly, agreements of that kind could not provide any grounds for recognising the relationship between the applicants as partners.

48. Lastly, the applicants observed that, even though there had been some steps at the domestic level indicating the authorities' intention to introduce a registered civil partnership in Ukraine, no further progress had been made in that regard.

2. *The Government*

49. The Government argued that the applicants could enjoy the same level of legal protection as any unmarried different-sex couple in Ukraine. They submitted that the scope of such protection available for the latter was limited to certain property rights, which they could claim only after the fact of their "living as a family" had been established by a judicial decision. In the Government's view, there was nothing to prevent a same-sex couple like the applicants from obtaining similar protection of their property rights, albeit by different means, by entering into private contractual agreements.

50. The Government further observed that certain legislative steps were being prepared in Ukraine with a view to introducing a registered civil partnership, which would be open to both different-sex and same-sex couples. More specifically, the drafting and submission to the Cabinet of Ministers of a draft law on that matter was one of the points in the Action Plan for implementation of the Human Rights Strategy for the period from 2021 to

2023, with the time-limit in December 2023. Accordingly, the Government submitted that, once that draft law was passed, the applicants would be able to enter into a legally registered civil partnership and enjoy the requisite protection of their rights.

3. *Third-party interveners*

(a) **Professor Robert Wintemute on behalf of Fédération Internationale pour les Droits Humains, Centre for Civil Liberties, and Network of European LGBTIQ Families Association and European Commission on Sexual Orientation Law**

51. The interveners drew the Court's attention to the fact that a clear majority of the Council of Europe member States had already decided to provide legal recognition and protection to same-sex couples.

52. They also submitted examples of case-law drawn from across the world showing that a growing number of national and international courts required at least an alternative to legal marriage, if not access to legal marriage for same-sex couples.

53. The interveners therefore underlined the importance of ensuring adequate protection for the applicants, as a same-sex couple, with respect to the core needs of a couple in a stable and committed relationship.

(b) **Ordo Iuris Institute for Legal Culture ("Ordo Iuris")**

54. The intervener, a Polish non-governmental organisation (NGO), submitted that the respondent State had not overstepped its margin of appreciation, which remained wide given the sensitive moral and ethical issues involved.

55. Ordo Iuris also argued that there was widespread opposition to same-sex relationships in Ukraine, where the majority of population identified themselves as Christians and had strong religious views.

(c) **"All together!" NGO**

56. The intervener, a Ukrainian NGO, submitted that same-sex couples had at their disposal all the necessary legal means for regulating their property rights as they wished.

57. It further argued that issues relating to sexual life, including sexual orientation, belonged exclusively to the sphere of private life and were not to be exposed publicly. Accordingly, the intervener maintained that by raising complaints focused on their sexual orientation, same-sex partners violated public morality norms, and allowing those complaints would imply "discrimination for Ukrainian society".

58. The "All together!" NGO also submitted that, after having obtained any form of legal recognition, same-sex couples would in all probability seek

entitlement to adoption of children, which would be particularly detrimental for the latter's rights.

59. Lastly, the intervener emphasised that protection of the traditional family was the clear will of the majority of the Ukrainian population, which was to be respected.

B. The Court's analysis

1. General principles

60. In order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Once the applicant has demonstrated a difference in treatment, the burden of proof is on the Government to show that the difference was justified (see *Beeler v. Switzerland* [GC], no. 78630/12, §§ 93-94, 11 October 2022, with further references).

61. Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the observance of the Convention's requirements rests with the Court. An additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the existence or non-existence of a European consensus (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, §§ 77 and 79, 24 January 2017, and the case-law references therein).

62. Sexual orientation is a concept covered by Article 14. Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow (see *X v. Poland*, no. 20741/10, § 70, 16 September 2021, with further case-law references). The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Macatė v. Lithuania* [GC], no. 61435/19, § 209, 23 January 2023, with further references).

63. The Court has observed in its case-law that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships and that they have the same needs in terms of mutual support

and assistance. Accordingly, it is now a settled principle of the Court’s case-law that same-sex couples are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship (see *Schalk and Kopf*, cited above, § 99, and *Vallianatos and Others*, cited above, § 81).

64. In the light of its well-established case-law principle that any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a “democratic society”, the Court has emphasised, albeit in the context of its analysis under Article 8 of the Convention, that allowing same-sex couples to be granted legal recognition and protection undeniably serves these ideals and values in that recognition and protection of that kind confers legitimacy on such couples and promotes their inclusion in society, regardless of sexual orientation. A democratic society within the meaning of the Convention rejects any stigmatisation based on sexual orientation, being built on the equal dignity of individuals and sustained by diversity (see *Fedotova and Others*, cited above, §§ 178-80, with further references).

65. While the Court has to date not interpreted Article 8 of the Convention as imposing a positive obligation on the States Parties to make marriage available to same-sex couples, it has confirmed that in accordance with their positive obligations under that provision, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship (*ibid.*, §§ 165 and 178). The Court has also held that Contracting States enjoy a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same sex couples (*ibid.*, § 188).

2. *Application of the above principles to the present case*

(a) **Whether there was a difference in the treatment of persons in analogous or relevantly similar situations**

66. The Court notes that the applicants have been living together in a stable and committed relationship since 2010. They are therefore in a relevantly similar situation to any different-sex couple as regards their need for legal recognition and protection of their relationship (see paragraph 63 above). This is a need experienced by two partners sharing their lives, which does not depend on the State’s approach to regulating the institution of marriage or putting in place any alternative means of legal recognition of couples, such as civil unions. The existing regulations and the State’s considerations behind them are to be taken into account at a later stage of the Court’s analysis, when assessing whether there was an objective and reasonable justification for treating persons in a relevantly similar situation differently (see paragraph 61 above and paragraphs 72-79 below).

67. The Court notes that the existing legal framework in Ukraine recognises two types of relationship for different-sex couples: marriage and a *de facto* family union, where a man and a woman “live as a family without being married” (see paragraphs 9-16 above). While the level of legal protection differs considerably depending on which of the two above-mentioned legal statuses a couple has, it is noteworthy that having one legal status or the other is neither imposed by the State nor stems from any objective reality but is purely the couple’s own choice.

68. The applicants are denied any such choice. Unlike different-sex couples who prefer not to get married for personal reasons and yet remain eligible for at least some legal recognition and protection owing to their living as a *de facto* family, the applicants neither have access to marriage in Ukraine, nor can they obtain any alternative form of legal recognition. It would therefore be artificial to compare their situation only with that of unmarried different-sex couples.

69. The Court notes that the Government have admitted in substance that the applicants are denied any opportunity to regulate fundamental aspects of life as a couple except certain property-related aspects, and then only as private individuals entering into contracts under the ordinary law (see paragraph 49 above). The Court has already held that such private contractual agreements cannot be considered to give recognition and the requisite protection to a couple, given that they are of limited scope and fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support (see *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 169, 21 July 2015). The Court also takes note of the absence of any possibility for the applicants to rely on the existence of their relationship in dealings with the judicial or administrative authorities.

70. It follows that the applicants, being a same-sex couple, were and are still treated differently from different-sex couples on account of the absence of any legal recognition and protection, which is available for the latter. The prospect of legislative amendments referred to by the Government (see paragraph 50 above) has no bearing on this conclusion as it remains remote and has no practical impact on the applicants’ daily life.

71. Last but not least, the Court notes that, as has not been disputed by the parties, the applicants’ sexual orientation is the sole basis for the above-mentioned difference in treatment.

(b) Whether the difference in treatment was justified

72. In the light of its case-law principles as they stand today (see, in particular, paragraph 65 above), the Court accepts that Ukraine is free to restrict access to marriage to different-sex couples only. It remains to be seen,

however, whether there has been any justification for the outright exclusion of same-sex couples from legal regulation.

73. The Court notes that the Government have not advanced any reasons, let alone convincing and weighty reasons, by way of justification for the difference in treatment complained of. Moreover, they admitted that same-sex couples like the applicants could expect to be afforded adequate legal recognition and protection with the adoption of a draft law on registered civil partnerships (see paragraph 50 above).

74. While welcoming the Government's intention to put in place a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship, which would be in line with the State's positive obligations under Article 8 of the Convention (see paragraph 65 above), the Court cannot speculate on a piece of legislation which does not exist yet. That said, the Court notes that the Ukrainian government has already abandoned on one occasion, in 2019, its intention to introduce a law on registered civil partnerships for different-sex and same-sex couples, with reference to numerous petitions from local authorities, religious organisations and NGOs (see paragraph 19 above). Although the contents of those petitions were not specified in the report in question, it appears that they concerned the necessity of protecting traditional family values.

75. The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment on grounds of sexual orientation. However, that aim is rather abstract and a broad variety of concrete measures may be used to implement it. Moreover, the concept of family is necessarily evolutive, as is shown by the changes it has undergone since the Convention was adopted (see *Fedotova and Others*, cited above, §§ 207-08). The Court has already held that there is no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity. Indeed, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples (see *Fedotova and Others*, cited above, § 212).

76. In other words, the broadly worded aim of the protection of the traditional family cannot in itself be accepted as a valid public-interest ground justifying the denial of any legal recognition and protection for same-sex couples.

77. The Court notes that the applicants' grievance is essentially that they should be entitled to be treated with equal dignity in their core needs as a couple in a stable committed relationship, whereby the reality of their situation would not be entirely disregarded by the existing legal framework

and whereby the State would confer a sense of legitimacy on their relationship by legally recognising its existence and by ensuring its adequate protection.

78. In analysing the State's margin of appreciation, the Court takes note of a clear ongoing trend at European level towards legal recognition and protection of same-sex couples within the member States of the Council of Europe, thirty of which currently provide for the possibility of legal recognition of same-sex couples (see *Fedotova and Others*, cited above, §§ 175 and 186).

79. Having regard to the above-mentioned considerations, the Court considers that in the present case the State has failed to provide any justification for treating the applicants differently as a couple as compared with different-sex couples.

(c) Conclusion

80. The Court concludes that the difference in treatment in the present case, which consisted in the unjustifiable denial to the applicants as a same-sex couple of any form of legal recognition and protection as compared with different-sex couples, amounts to discrimination against the applicants on the grounds of their sexual orientation.

81. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 8.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

83. The applicants noted that, in the absence of legal recognition of their relationship, they had been obliged to draw up wills as the only means of securing the surviving partner's inheritance rights. They therefore claimed 32 euros (EUR) each in respect of pecuniary damage, corresponding to the notary fees for their wills.

84. The applicants also claimed EUR 11,750 each in respect of non-pecuniary damage, which corresponded to about EUR 1,000 for each year of their life together as a couple. They submitted that all that time they had been confronted with discrimination on account of their sexual preferences, rendering their daily life difficult in many respects. The applicants emphasised that their situation was further exacerbated by a permanent feeling of helplessness and emotional distress.

85. The Government contested the above claims as unsubstantiated.

86. The Court considers it reasonable to award each of the applicants EUR 32 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

87. The applicants claimed EUR 15,000 for the costs and expenses incurred before the Court, to be paid directly into Mr Tarakhkalo's bank account. In support of that claim, they submitted a legal services contract signed by Mr Maymulakhin and Mr Tarakhkalo on 18 November 2014 indicating an hourly rate of EUR 150. According to the contract, payment was due after completion of the proceedings in Strasbourg and within the limits of the sum awarded by the Court in respect of costs and expenses. The applicants also submitted a report of 30 September 2021 on the work completed under the aforementioned contract. It specified that Mr Tarakhkalo had worked on the case for 100 hours and that the total amount due was EUR 15,000.

88. The Government contested the above claim as unsubstantiated and exorbitant.

89. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000 under this head, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any taxes that may be chargeable to the applicants:
 - (i) EUR 32 (thirty-two euros) to each of the applicants in respect of pecuniary damage;

- (ii) EUR 5,000 (five thousand euros) to each of the applicants in respect of non-pecuniary damage;
 - (iii) EUR 4,000 (four thousand euros) to the applicants jointly, in respect of costs and expenses (to be paid into the bank account of their lawyer Mr Tarakhkalo);
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 1 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller
Deputy Registrar

Georges Ravarani
President